No. 86-768

IN THE
SUPREME COURT OF THE UNITED STATES
October, Term, 1986

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

v.

MISSOURI PACIFIC RAILROAD COMPANY, ALBERT WAYNE COX, AND MICHAEL G. CADE,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

WILLIAM C. GOODING
Wheeler, Gooding & Dodson
310 Texarkana National Bank Bldg.
P.O. Box 1838
Texarkana, Texas 75504
(214) 794-3121
Of Counsel

DANIEL V. FLATTEN
JAMES L. WEBER
BRIAN R. DAVIS
Mehaffy, Weber, Keith & Gonsoulin
InterFirst Tower
P.O. Box 16
Beaumont, Texas 77704
(409) 835-5011

410 First Federal Plaza
10th & Brazos
Austin, Texas 78701
(512) 476-0825
Counsel for Petitioner

November 10, 1986

QUESTIONS PRESENTED

The Seventh Amendment assures petitioner's right to a jury decision of material fact issues in this civil damage action. The Judicial Code preserves an important adjunct: the right of peremptory challenges. The opinion by the Court of Appeals, affirming judgment against petitioner for over $2.5 million, concedes error in the trial court's jury instructions. The Court of Appeals also noted the disparity between the number of peremptory challenges allowed petitioner in contrast to the surplus allocated to respondents, particularly inasmuch as petitioner had to consume a strike to remove a venireman challenged unsuccessfully for cause. Yet the appellate court found no harm to petitioner by either error sufficient to warrant reversal for a new trial. The questions now presented are:

1. Did the Court of Appeals deny petitioner's Seventh Amendment right to trial by jury in concluding that, absent the erroneous instruction, the jury would have decided against petitioner anyway, even though, because of the error, the jury never passed on the fact issue now foreclosed by the appellate court?

2. Were petitioner's federal rights substantially impaired by trial court abuse of discretion in the apportionment of peremptory challenges or the denial of petitioner's challenge-for-cause, to the end that the case must be reversed for a new trial?

Rule 28.1 Listing

1. Mr. Albert Wayne Cox
2. Mr. Michael G. Cade
3. Missouri Pacific Railroad Company
4. Kansas City Southern Industries, Inc, (parent)
5. The Kansas City Northern Railway Company
6. The Kansas City Southern Railway Company
7. Louisiana & Arkansas Railway Company
8. The American-Coleman Company
9. American-Coleman International Corp.
10. The Arkansas Western Railway Company
11. Boston Financial Data Services, Inc.
12. Carland, Inc.
13. Cybertech, Inc.
14. DST, Inc.
15. DST Clearing, Inc.
16. DST-Computer-Services, S.A.
17. DST Securities, Inc.
18. Fort Smith and Van Buren Railway Company
19. Investors Fiduciary Trust Company
20. Joplin Union Depot Company
21. The Kansas and Missouri Railway and Terminal Company
22. Kansas City Southern Transport Company, Inc.
23. Kansas City Terminal Railway Company
24. Landa Motor Lines
25. Lonestar-KC Concrete Tie Company
26. Louisiana, Arkansas & Texas Transportation Company
27. The Maywood and Sugar Creek Railway Company
28. Midwestern Minerals, Inc.
29. Mid-America Television Company
30. Northern Properties Corporation
31. Pabtex, Inc.
32. Pioneer Western Corporation
33. Pioneer Western Energy Corporation

34. Pioneer Western Financial Corporation
35. Pioneer Western Financial Planning Corporation
36. Pioneer Western Management, Inc.
37. Pioneer Western Marketing Corporation
38. Reserve Realty
39. Rice-Carden Corporation
40. Rycom Instruments, Inc.
41. Southern Development Company
42. Supporet Systems, Inc.
43. Tolmak, Inc.
44. Trans-Serve, Inc.
45. Veals, Inc.
46. Wall Street Clearing Company
47. Western Reserve Financial Services Corp.
48. Western Reserve Life Assurance Co. of Ohio

TABLE OF CONTENTS

INDEX OF AUTHORITIES

IN THE

Supreme Court of the United States

October Term, 1986

NO.

THE KANSAS CITY SOUTHERN
RAILWAY COMPANY,

Petitioner,

v.

MISSOURI PACIFIC RAILROAD COMPANY,
ALBERT WAYNE COX, AND
MICHAEL G. CADE,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, The Kansas City Southern Railway Company, respectfully prays that a writ of certiorari issue to review the judgment and decision of the United States Court of Appeals for the Fifth Circuit, entered August 20, 1986.

OPINION BELOW

The opinion of the Court of Appeals is unreported and is reproduced at Appendix A, *infra.* Its unreported order denying the petition for rehearing and suggestion for rehearing en banc, entered October 1, 1986, is reproduced at Appendix B. By order dated October 14, 1986, reproduced at Appendix C, the Court of Appeals granted a stay of the mandate to and including November 13, 1986. The judgment reviewed by the Court of Appeals is unreported and reproduced at Appendix D, together with the verdict of the jury.

JURISDICTION

The jurisdiction of this Court to review the final judgment of the Court of Appeals is invoked under 28 U.S.C. Sec. 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Seventh Amendment:

> In suits at common law, . . . the right of trial by jury shall be preserved. . . .

Judicial Code, Title 28, United States Code, Section 1870:

> In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.
>
> All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

STATEMENT OF THE CASE

A. Trial Proceedings

Respondents Cade and Cox, employees of respondent Missouri Pacific, sued petitioner in diversity for damages on account of personal injuries. The applicable substantive law is that of Texas, pursuant to which petitioner brought its third-party action for contribution against Missouri Pacific.

Both Cade and Cox sustained back injuries in jumping from the locomotive of their Missouri Pacific train about 400 feet ahead of what turned out to be a relatively minor collision with petitioner's train, which was being flagged through an "interlocker" crossing shared by the railroads. Cade and Cox contended that petitioner had negligently failed to observe proper precautions for entering the interlocker against a red signal and that, although they had thrown their emergency brake at a point 1,628 feet ahead of the intersection, the enormity of their fear of collisiion justified their jump and substantial damages against petitioner. Although suit against Missouri Pacific under the Federal Employers Liability Act, 45 U.S.C. Sec. 51, was available, Cade and Cox sued only petitioner.

Petitioner's third-party action against Missouri Pacific is governed by a Texas statute, Tex. Civ. Prac. & Rem. Code, Sec. 33.011 *et seq.* (formerly Tex. Rev. Civ. Stat. Ann. Art. 2212a), which authorized petitioner to pursue contribution in proportion to such percentages of negligence as the jury should elect to assign to petitioner and Missouri Pacific, respectively, as having proximately caused the accident. *Id.*, Sec. 33.012. Petitioner presented several theories against Missouri Pacific, chief among which was the latter's undisputed operation of its 85-car train with inoperable power brakes on at least six cars, some with their air valves closed. Invoking 45 U.S.C. Sec. 9 and that statute's current implementing regulation, 49 C.F.R. Sec. 232.1,[1] petitioner urged that Missouri Pacific's inoperable brakes constituted negligence and negligence *per se* under Texas law and a proximate cause of the injuries. By concession of Missouri Pacific's own expert, six cars with bad brakes lengthened its train's stopping distance 56 feet. (Tr. II, 39–40). Other testimony and physical evidence would have permitted a trier of fact to find that Missouri Pacific's inoperable brakes lengthened its stopping distance by as much as 300 feet over what would have been required with working power brakes on all cars. (Tr. I, 58, 79; Tr. II, 145, 190–91, 195). Under either version there would have been no collision or even near-collision. (Tr. I, 127, 181).

---

[1] The cited regulation provides:

On and after September 1, 1910, on all railroads used in interstate commerce, whenever, as required by the Safety Appliance Act as amended March 2, 1903, any train is operated with power or train brakes, not less than 85 percent of the cars of such train shall have their brakes used and opeated by the engineer of the locomotive drawing such train, and *all power-brake cars in every such train which are associated together with the 85 percent shall have their brakes so used and operated.*

(Emphasis added).

This regulation is reinforced by 49 C.F.R. Sec.232.11(c), which adds that "at no time shall the number and location of operative air brakes be less than permitted by Federal requirements."

The suit was tried in the United States District Court for the Eastern District of Texas before a jury of six, selected from a panel of 20. At voir dire, both the plaintiffs, Cade and Cox, and third-party defendant Missouri Pacific asserted that petitioner was solely at fault but Missouri Pacific purported to "deny the nature and extent of the injuries and damages" to Cade and Cox. (First Supplemental Rec. 9–11, 29–31). Over petitioner's objection, the trial court awarded Cade and Cox, jointly, four peremptory challenges, two to Missouri Pacific, and two to petitioner. (Second Supplemental Rec. 2–3).

Petitioner shortly had to use one of its two to remove a panelist whom the trial court refused to excuse for cause. The panelist had discussed the case "at various times" with a Missouri Pacific employee's (a listed potential witness) mother-in-law and admitted that he "might be influenced" by what he had heard from her. (First Supplemental Rec. 22, 26). Cade and Cox exercised all four of their strikes, Missouri Pacific neither of its two. Petitioner exhausted its strikes.

Once the jury was seated and the trial began, all traces of the ostensible adversity that Missouri Pacific had indicated as against the plaintiffs at voir dire evaporated. The Missouri Pacific did not cross-examine any of the plaintiffs' doctors or damage witnesses nor offer any evidence about their damages nor question the plaintiffs' claims in argument. Indeed, Missouri Pacific's counsel emphatically urged the jury to award Cade and Cox the full sums displayed on their lawyer's jury argument chart, nearly $3 million. (Tr. II, 258).

The case was submitted to the jury on an oral charge and written verdict interrogatories. The oral charge contained the "15%" excuse instruction regarding Missouri Pacific's inoperable brakes, an instruction which the Court of Appeals admitted "is inconsistent with the regulations." In response to verdict question 3, the jury answered "No" to the issue whether Missouri Pacific's "[a]llowing the train to operate with defective brakes" was negligence. The jury accordingly did not reach the issues of proximate causation or percentage apportionment as between petitioner and Missouri Pacific. (Rec. 206–07, Appendix D). The jury assigned 100% of the responsibility to petitioner and awarded Mr. Cade $1,716,000.00 in damages, $850,000.00 to Mr. Cox. (*Id.*, 207–08).

B. Appellate Proceedings

In the Court of Appeals, petitioner renewed its objections to the erroneous charge and to the trial court's misallocation of peremptory challenges, aggravated by the denial of petitioner's challenge-for-cause. In the former respect, Texas law holds that "[t]he unexcused violation of a statute or ordinance constitutes negligence as a matter of law if such statute or ordinance was designed to prevent injury to the class of persons to which the injured party belongs." *Nixon v. Mr. Property Management*, 690 S.W.2d 546, 549 (Tex 1985); see *Missouri Pacific R. Co. v. American Statesman*, 552 S.W.2d 99, 103 (Tex. 1977). Negligence *per se* having been established prima facie by Missouri Pacific's undisputed violations of 45 U.S.C. Sec. 9 and 49 C.F.R. Sec. 232.1, the burden shifted to Missouri Pacific to offer evidence of an "impossibility, incapacity or emergency" as an excuse. *Moughon v. Wolf*, 576 S.W.2d 603, 605 (Tex. 1978); *Impson v. Structural Metals, Inc.*, 487 S.W.2d 694, 697 (Tex. 1972). Missouri Pacific offered none.[2]

"In the absence of some evidence of legally acceptable excuse, [petitioner] had no further burden to request an issue and prove the case by a common law negligence standard." *Moughon v. Wolf, supra*, 576 S.W.2d at 606. In short, the question whether Missouri Pacific *was negligent* should have fallen out of the case, the jury to consider only proximate cause and percentage apportionment.

---

[2]Nor was there any contention or evidence that the train was being hauled to the nearest repair point for the purpose of making repairs, a theory accepted as a defense to civil penalties in *United States v. Northern Pacific Ry. Co.*, 77 F.2d 587, 590 (9th Cir. 1935). The Missouri Pacific made no effort to account for the inoperable brakes and cut-out air valves. The evidence is undisputed that, during a stop en route prior to this accident, the Missouri Pacific crew failed to complete a visual inspection of the brakes, undertaken after the train unexpectedly went into emergency. (Tr. I, 74–75, 137, 141.) The inspection was cut short because Mr. Cade, the engineer, was in a hurry. (Tr. I, 50, 137).

Petitioner also called abundant other authorities to the appellate court's attention, sufficient to demonstrate the acknowledged error of the "15%" excuse portion of the charge. E.g., *Fairport, P.&E.R. Co. v. Meredith,* 292 U.S. 589, 596 (1934) (pre-*Erie* Ohio case; motorist at highway crossing held protected against collision); *New York Central R. Co. v. United States,* 265 U.S. 41, 46 (1924); *Zavorka v. Union Pacific Railroad Co.*, 690 P.2d 1285, 1287 (Colo. App. 1984) (railroad employee protected); *Missouri-Kansas-Texas R. Co. v. Evans,* 250 S.W.2d 385, 388 (Tex. 1952) (same); *United States v. Atchison, Topeka and Santa Fe Railway Co.*, 205 F. Supp. 589, 591 (S.D. Cal. 1962); *United States v. Panhandle & S.F. Ry. Co.*, 21 F. Supp. 919, 921 (N.D. Tex. 1937); ICC Report, U.S. Code Cong. & Admin. News, 85th Cong., 2d Sess. 1958, at 2345 ("Inoperative train brakes associated together with operative brakes are in violation of the law.").[3]

---

[3]The same ICC report confirms the Commission's consistent interpretation of the law to the effect that orders issued since 1910 had "had the effect of increasing this percentage to 100 percent" and that "all such [power-braked] cars associated together must have their brakes used and operated." See ICC Order 13528, as amended, 17 Fed. Reg. 8653 (Sept. 30, 1952); 17 Fed. Reg. 8957 (Oct. 7, 1952); 17 Fed. Reg. 10738 (Nov. 26, 1952).

That administrative interpretation of 45 U.S.C. Sec. 9 by the enforcing agency is entitled to great deference, *Udall v. Tallman,* 380 U.S. 1, 16 (1965), which is enlarged by the Congress's acceptance of the Commission's interpretation in reenacting the statute in 1958. *United States v. Board of Commissioners of Sheffield, Alabama,* 435 U.S. 110, 134 (1978); *Albemare Paper Co. v. Moody,* 422 U.S. 405, 414 n. 8, 431 (1975).

It suffices for present purposes to observe that, irrespective whether judged in terms of the Texas negligence *per se* doctrine or a common-law standard of ordinary and prudent care, Missouri Pacific could not defend the erroneous charge in the Court of Appeals. The "15%" paragraph simply should not have been in the charge, as it deflected the jury from applying the correct substantive law to the evidence. Missouri Pacific argued, instead, that there was "no causal relation" between its inoperable brakes and the emergency as Cade and Cox perceived and reacted to it. Apparently the Court of Appeals succumbed, indeed as a matter of law, since the appellate court found the challenged instruction harmless error:

> The instruction KCS challenges could not have affected the outcome of the case. Cade and Cox did not jump from the locomotive because of a real or imagined fear of the loss of braking power on their train; they did their quick exit because they saw they were sharing the track with another behemoth. In that setting, it is manifest that the questioned charge occasions no basis for reversal.

The Court of Appeals separately rejected petitioner's complaints of inadequate peremptories (conversely, that Cade and Cox had received one too many) and denial of the challenge-for-cause. The appellate court held that petitioner failed to show prejudice by failing to make a "convincing showing that the additional peremptory challenge would have been used." It found no evidence that petitioner had been forced to take an objectionable juror due to consumption of a peremptory to remove the panelist to whom its challenge-for-cause was denied. The court did not address at all petitioner's contention that the *tandem effect* of inadequate peremptories and denial of the challenge-for-cause worked an impermissible substantial impairment of the right of peremptory challenges.

REASONS FOR GRANTING THE WRIT

This is an important, writ-worthy case, not because the Fifth Circuit misapplied Texas law or because it involves a lot of money. Those collateral difficulties are obvious enough, but on closer analysis it becomes undeniable that the decision works serious mischief to the fair administration of jury trials in the district courts. On one hand, the Court of Appeals has done something that neither the trial court nor the litigants considered justified: it has ordered a directed verdict against petitioner on the jury issue of proximate causation arising from Missouri Pacific's inoperable power brakes. On the other, it has embraced—indeed entangled itself in—the illusory notion that a denial of peremptory challenges at trial should be judged on appeal according to whether jurors who heard the case were actually biased against the complaining party. That approach not only tries to mix water and oil but its very premise—that such a showing is feasible—is specious.

1. The Seventh Amendment bars the Court of Appeals from holding that, absent erroneous instructions, the jury still would have found no liability against Missouri Pacific, especially where, as here, the error prevented the jury from reaching the fact issue—proximate causation—preempted by the appellate court.

The Fifth Circuit's treatment of the erroneous "15%" excuse instruction is an artful exercise in appellate fact finding masquerading as harmless error verbiage, F.R. Civ. P.61. Regardless of the facial merit of the court's argument that an erroneous charge should be held harmless if it "could not have affected the outcome of the case," that argument cannot justify appellate preclusion of a trial by jury where the jury never reached the part of the case in question precisely because the error stood in the way.

In truth, no one—certainly not the Court of Appeals—knows what the jury would have decided as to Missouri Pacific's negligence and proximate causation if the trial court had omitted the challenged instruction. Six bad-braked cars out of 85 is only 7%, well within the erroneous 15% factor in the charge, but

wholly outside the number permitted by law. "Section 9 [of Title 45, United States Code] is violated whenever even one car, connected on the air brake line, does not have its air brakes operative." *United States v. Atchison, Topeka and Santa Fe Railway Co., supra,* 205 F. Supp. at 591.

The Court of Appeals simply speculated its way to a *factual* result. But it is for the jury—only the jury—to decide whether and to what extent the Missouri Pacific train's shortage of braking power affected Cade's and Cox's decision to jump. Would those men have felt equally impelled to an identical "quick exit" if their train's power brakes had functioned on all the cars, whereby a full stop would have been achieved at least 56 feet, perhaps as much as 300 feet, ahead of where their defectively-braked train actually came to rest? Without a doubt, the inoperable brakes had a direct impact on the men's thought processes in their perception of the danger and reaction to it.[4] Yet the jury was diverted by a decidedly-erroneous instruction from making a proper evaluation of the evidence in terms of Missouri Pacific's negligence, and now the Court of Appeals has terminally usurped the jury's prerogative to decide the extent to which that negligence contributed to the fear that motivated Cade and Cox to jump.

---

[4]Cade and Cox testified that their train was at a point 1,628 feet ahead of the crossing when they applied the emergency. (Tr. I, 58, 79, 114). Missouri Pacific's speed tape indicated that the train's speed was 41 m.p.h. when placed into emergency and that 25 seconds elapsed to a full stop from the time the tape registered a speed reduction. (Tr. II, 139-40, 145). According to Missouri Pacific's interpretation of the tape, the train travelled a quarter-mile (1,320 feet) during the 25 seconds. (Tr. II, 143). Given that Cade and Cox had already reacted to the need to apply the emergency by the time they threw the switch ("reaction time"), the jury was entitled to decide whether bad brakes on six cars were a cause in fact, its consequences foreseeable to Missouri Pacific in case of an obstructed right-of-way, of 308 feet of unbraked, unaccounted-for slack travel (1,628 minus 1,320). Had the brakes reduced the train's speed up to 300 feet sooner, Cade and Cox should not have felt a similar compulsion to jump 1,200 feet later.

Significantly, the erroneous instruction aside, the trial judge considered Missouri Pacific's negligence and proximate causation for operating with bad brakes to be legitimate jury issues upon which reasonable minds might differ. Apparently Missouri Pacific agreed, as it proceeded with its evidence without moving for a directed verdict at the conclusion of petitioner's case. (Tr. II, 100); F.R. Civ. P. 50(a). Hence, not only has the Court of Appeals effectively directed a verdict against petitioner in violation of the Seventh Amendment,[5], it has done so contrary to what the trial judge and the litigants contemporaneously recognized as a classic jury case. Under Texas law, Missouri Pacific's negligence need not have been found the sole cause of the accident for liability to attach in contribution, only a concurring cause, 1% to 99%. Tex. Civ. Prac. & Rem. Code, *supra*, Secs. 33.012, 33.013; *McClure v. Allied Stores of Texas, Inc.*, 608 S.W.2d 901, 903-04 (Tex. 1980); *Missouri Pacific R. Co. V. American Statesman, supra*, 552 S.W.2d at 103-04.

An essential characteristic of civil justice in the federal courts is the Seventh Amendment's assignment of disputed fact issues to the jury. *Byrd v. Blue Ridge Rural Electric Cooperative*, 356 U.S. 525, 537 (1958). This Court's discussion in *Curtis v. Loether*, 415 U.S. 189, 194 (1974), applies squarely to petitioner's right to a jury trial of its claim for contribution:

> Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law.

---

[5]Compare *Baltimore & Carolina Line v. Redman*, 295 U.S. 654 (1935), with *Slocum v. New York Life Ins. Co.*, 228 U.S. 364 (1913); Advisory Committee Note to Subdivision (a), F.R. Civ. P.50.

If anything, the Fifth Circuit's abuse of petitioner's right to trial by jury is more flagrant than the federal appellate decision reversed by this Court in *Byrd.* Unlike *Byrd,* this case presents no conformity conflict between the policy of the Seventh Amendment, which favors jury trial, and a contrary, arguably-substantive State rule of practice that *Erie R. Co. v. Tompkins,* 304 U.S. 64 (1938), would bind a federal court to follow. Petitioner would have received a full jury determination of Missouri Pacific's share of the fault in a Texas court. The contribution statute itself contemplates jury trial of each tortfeasor's percentage. Cf. Tex. Civ. Prac. & Rem. Code, *supra,* Sec. 33.014 (authorizing jury determination of a settling tortfeasor's percentage). Multi-party negligence suits, when tried, are routinely tried to juries in Texas, and the jury decides the contribution claims as well as the principal liability. It follows that the Fifth Circuit's misuse of harmless error analysis to work a denial of Seventh Amendment rights has no support in any affected jurisdiction's substantive policy. The Court of Appeals should have simply corrected the trial court's concededly-erroneous charge by ordering a new trial under proper instructions instead of compounding it into federal constitutional error.[6].

In conclusion, the Court of Appeals has arrogated to itself the fact-finding role that the Constitution reposes in the jury. In its insistence to conclude the substantial fact issues of Missouri Pacific's causal fault, the appellate court lost sight of its responsibility to correct prejudicial legal errors occurring in the trial court. Its judgment must be reversed and remanded for a new trial of petitioner's claim for contribution against Missouri Pacific.

2. A substantial impairment of the right of peremptory challenges is a denial of peremptory challenges. A trial court's discretion in administering challenges is neither unfettered nor to be shielded by unreasonable, cynical obstacles to appellate review.

---

[6]Petitioner assigned the appellate court's Seventh Amendment error in the petition for rehearing and suggestion for en banc hearing, which represented the earliest stage at which the point could be raised in the lower court.

The Court of Appeals rejects petitioner's jury selection complaints with a series of generalizations, none of which need be disproven to show that the court grasped at straws to evade the problem. The peremptory challenge is one of the most important and valuable rights of a litigant. *Swain v. Alabama,* 380 U.S. 202, 220 (1965). Petitioner demonstrated prejudice. Petitioner (i) duly made its objection to the 4-2-2 misallocation known to the trial court and counsel; (ii) had to consume one of its two strikes to remove a panelist with extrajudicial knowledge about the case and familiarity with a potential witness after denial of its challenge-for-cause; (iii) exhausted its allowed strikes; (iv) had to accept a juror who knew the plaintiffs' attorneys personally and from business as well as a juror with a history of painful slipped discs[7]; and (v) watched a trial unfold in which the Missouri Pacific aligned itself with Cade and Cox on every issue, including the amounts of their damages, contrary to its representations in chambers and at voir dire.

By any objective view, the trial court's apportionment of strikes coupled with its denial of petitioner's challenge-for-cause denied petitioner a fairly-constituted jury. In practical terms the defense got only one-fourth the number of strikes exercised by the offense. This was brought about because the trial court was led to exercise an unreasoned or misinformed discretion. A similar abuse was reversed in *John Long Trucking, Inc. v. Greear,* 421 F.2d 125, 128 (10th Cir. 1970), in which the court observed:

> Refusal upon request to exercise the statutory discretion may very well result in substantial impairment of the ancient right with consequent denial of the constitutional right to a fair and impartial jury.

One more peremptory challenge would have effectively brought the defense to half instead of one-fourth the strikes exercised by the offense in this multi-party common accident case. In *Photostat Corp. v. Ball,* 338 F.2d 783 (10h Cir. 1964), several prospective jurors had refused to answer questions about prior injury claims because they thought the judge only meant lawsuits. The appellate court reversed and remanded for a new

---

[7]First Supplemental Rec. at 19 (Mrs. Stevens), 24 (Mr. Campbell).

trial even though it found that the trial court "could have justifiably denied a challenge for cause." *Id.* at 785. The error is analogous here in that the denial of petitioner's challenge-for-cause, though it might be affirmed in a vacuum, had the actual effect of substantially impairing petitioner's right of peremptory challenges.

In summary, and contrary to the Fifth Circuit's treatment, the point does not turn on the lack of a statutory prescription for mathematical equality nor on the trial judge's presumed finding that the challenged juror harbored no actual bias. It boils down, instead, to the plain fact that petitioner ended up with, effectively, only one strike to use in rejecting jurors for *suspected* bias or prejudice. The words of the Tenth Circuit in *Photostat* are in point, 338 F.2d at 784:

> No one will gainsay that the denial or substantial impairment of the statutory right of peremptory challenges is prejudicial to the constitutional right to a fair and impartial jury.

The trial court's errors in allocating peremptory challenges in tandem with the denial of petitioner's challenge-for-cause were prejudicial to petitioner's statutory and constitutional right to a fair and impartial jury. Petitioner has shown prejudice—as much as an appellate court could realistically require in evaluating a denial of peremptories. By definition, they effectuate suspicion and instinct. The litigant exercises them arbitrarily; proof of disqualification is unnecessary. Petitioner submits that the judgment of the Court of Appeals must be reversed and remanded for a complete new trial.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted, to the end of reversing the judgment of the Fifth Circuit and remanding the case to the trial court for a new trial of all issues or, alternatively, a new trial of petitioner's third-party action for contribution against the Missouri Pacific Railroad Company.

Respectfully submitted,

DANIEL V. FLATTEN
JAMES L. WEBER
BRIAN R. DAVIS
Mehaffy, Weber, Keith & Gonsoulin
InterFirst Tower
P.O. Box 16
Beaumont, Texas 77704
(409) 835-5011

410 First Federal Plaza
10th & Brazos
Austin, Texas 78701
(512) 476-0825

By _____
Daniel V. Flatten

Counsel for Petitioner

WILLIAM C. GOODING
Wheeler, Gooding & Dodson
310 Texarkana National Bank Bldg.
P.O. Box 1838
Texarkana, Texas 75504
(214) 794-3121

Of Counsel

CERTIFICATE OF SERVICE

I hereby certify that three (3) copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been mailed by United States mail, postage prepaid, to the attorneys for Respondents, Mr. Franklin Jones, Jr., P.O. Box 1249, Marshall, Texas 75670 and Mr. Mike A. Hatchell, P.O. Box 629, Tyler, Texas 75710, on this 11th day of November, 1986 at the time of filing with the Clerk. All parties required to be served have been served.

_____
Counsel for Petitioner

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No.

ALBERT WAYNE COX,

Plaintiff-Appellee,

versus

KANSAS CITY SOUTHERN RAILWAY CO.,

Defendant-Appellant.

* * * * * * * * *

MICHAEL G. CADE,

Plaintiff-Appellee,

versus

KANSAS CITY SOUTHERN RAILWAY CO.,

Defendant-Third Party Plaintiff-Appellant,

versus

MISSOURI PACIFIC RAILROAD CO.,

Third Party Defendant-Appellee.

Appeals from the United States District Court for the Eastern District of Texas

---

(August 20, 1986)

Before GEE, POLITZ, and GARWOOD, Circuit Judges.

POLITZ, Circuit Judge:*

*Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

In this Texas diversity negligence case, Kansas City Southern (KCS) appeals a jury-verdict judgment, challenging the jury selection procedures, various evidentiary rulings, the jury charge, and the damages awarded. Finding no reversible error, we affirm.

Facts

In the pre-dawn hours of February 5, 1982, an eastbound Missouri Pacific (MoPAC) train and a southbound Kansas City Southern (KCS) train collided at a track intersecion near Texarkana, Texas. The KCS train first reached the intersection, sometimes referred to as the 341 interlocker, and stopped in response to a red light. When the light failed to change a KCS crew-member, suspecting an electronic malfunction, examined the interlocker box and then flagged the KCS train through the interlocker diamond.

In the meantime, the MoPAC train was proceeding on a green light which apparently resulted from a malfunction in the electronic traffic control system. The MoPAC engineer, Michael G. Cade, and head-brakeman, Albert Wayne Cox, saw the KCS train blocking the intersection. They responded to this situation by engaging the emergency brakes and jumping from their locomotive, about 400 feet prior to the point of impact between the two trains. Both sustained back injuries. The collision between the two trains was relatively minor, considering the potential.

Alleging that their injuries were directly and proximately caused by the negligence of the KCS employees in traversing the interlocker without following the prescribed rules, Cox and Cade filed the instant negligence complaint against KCS. KCS denied liability and filed a third-party complaint against MoPAC, alleging that MoPAC was negligent in its maintenance of the interlocker box and in operating a train with defective airbrakes.

In response to special interrogatories, the jury found that: (1) KCS was negligent in attempting to enter the interlocker and its negligence was a proximate cause of the injuries sustained by Cox and Cade; (2) Cade was not negligent for jumping from the train, nor was he negligent for failing to keep a proper lookout, for traveling too fast, or for wrongful application of the brakes; (3) Cox was not negligent for jumping from the train; (4) MoPAC was not negligent for its actions with reference to the interlocker box, or for allowing a train to operate with defective brakes, or for operating a train at excessive speeds; and (5) the negligence of KCS was 100% responsible for plaintiffs' injuries. The jury set Cade's damages at $1,716,000, and Cox's damages at $850,000. The trial court denied KCS's post-trial motions and this appeal followed.

Discussion

Jury Selection

The trial judge alloted two peremptory challenges to each plaintiff, and a like number each to KCS and MoPAC. KCS maintains that this constituted an unfair distribution of peremptory challenges, warranting a new trial, because MoPAC was actually aligned with Cox and Cade.

The allocation of peremptory challenges in a multiparty civil suit is governed by 28 U.S.C. § 1870 which provides:

> In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purposes of making challenges, or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.

The statute contains no reference to mathematical equality for additional challenges. That allocation is a matter which rests in the trial court's sound discretion. **Moore v. South African Marine Corp.,** 469 F.2d 280 (5th Cir. 1972). In doing so, the court must consider the alignment of the parties, both *de jure* and *de facto.* In **Carey v. Lykes Brothers Steamship Co.,** 455 F.2d 1192 (5th Cir. 1972), we found no abuse of discretion where the trial court alloted the same number of peremptory challenges to the plaintiff and to the defendant and third-party defendant jointly. *Accord* **Goldstein v. Kelleher,** 728 F.2d 32 (1st Cir.), *cert. denied,* 105 S.Ct. 172 (1984); **Fedorchick v. Massey-Ferguson, Inc.,** 577 F.2d 856 (3d Cir. 1978) (denying rehearing *en banc*). In **Goldstein,** 728 F.2d at 38, the First Circuit opined that it would not reverse, even if it found an improper allocation, absent a convincing showing that the additional peremptory challenge would have been used.

We find no error requiring a new trial, since KCS has failed to demonstrate any prejudice. Further, the argument of KCS that plaintiffs and MoPAC were actually allies is not persuasive.

We likewise perceive no reversible error in appellant's claim that the district court erred for refusing to strike a potential juror for cause because he had heard about the accident. KCS claims prejudice because it was forced to expend a peremptory challenge to excuse that juror.

The trial court's discretion in ruling on for-cause challenges will be sustained absent a manifest abuse. **Dennis v. United States,** 339 U.S. 162 (1949). Simple exposure to information about the incident which is the subject of the trial, civil or criminal, does not automatically disqualify a potential juror. **Hale v. United States,** 435 F.2d 737 (5th Cir. 1970). *cert. denied,* 402 U.S. 976 (1971). A dismissal for cause is in order only when the information has resulted in a fixed opinion about the merits of the case. **Irvin v. Dowd,** 363 U.S. 717 (1961). We find no basis for such a finding in this record. The venireman in question satisfied the court that his knowledge would not affect his service as a juror if chosen. This venireman was excused by KCS, but we find only argument, unsupported by evidence, that it was forced to accept an otherwise objectionable juror because it had used a peremptory on this venireman. We find no merit in the selection-of-jury assignments of error.

Jury Charge

KCS maintains that the trial judge erroneously charged the jury and this erroneous charge misled the jury into finding MoPAC free of negligence:

> Finally, in the event that you have determined—aren't you glad tohear that word finally—finally in the event that you have determined that the Defendant KCS Railway is guilty of negligence in any respect, which is a proximate cause of the plaintiffs' injuries, it will also be necessary for you to consider the Defendant KCS Railway's contention that the negligence of Missouri Pacific Railroad was a contributing cause to the plaintiffs' injuries. Again, the Defendant KCS Railway has the burden of establishing by a preponderance of the evidence that the Defendant Missouri Pacific Railroad was guilty of negligence which was a proximate cause of the plaintiffs' injuries. Thus, you are instructed in connection with these contentions, that if you find the Defendant KCS Railway has established that the Defendant Missouri Pacific Railroad was guilty of negligence by failing to properly design or maintain the interlock signals in question, or in authorizing the engineer of the train involved in the accident to proceed at an excessive speed, or in failing to provide adequate brakes for the Missouri Pacific train in this accident, in this connection with the KCS Railway's contention that the train was operated with defective brakes, you are instructed that the brakes must be working properly on a freight train when it leaves its initial terminal. In this case, I believe it was the City of Palestine. If all brakes were not properly working when the train left Palestine, such was a violation of the law. If you find from a preponderance of the evidence, that the Missouri Pacific violated this law, such conduct is presumed to be negligence.
>
> In that event, you will determine whether such violation was a proximate cause of any injuries to the plaintiffs, since a law violation alone will not justify a verdict against the Missouri Pacific unless the violation was a proximate cause of the plaintiffs' injuries.

> You are further charged, however, that under the law a train, after leaving its initial terminal, is permitted to have in its consist or string of cars, cars with no brakes working, provided that the number of such cars does not exceed 15 percent of the number of cars in the consist. That is a funny word, I hadn't heard the word consist before, I finally figured out what they were talking about. They are talking about the train, the whole thing.

KCS does not challenge the correctness of the first paragraph, which comports with the applicable federal regulation, 45 C.F.R. § 232.12. KCS does challenge that portion of the final paragraph which instructs that a train may be operated even if as much as 15% of the consist has faulty airbrakes. This portion of the charge is inconsistent with the regulations. The issue before this court is whether this reference in the charge, considered against the entire charge, indeed the entire record, warrants a reversal for new trial. We conclude it does not.

The trial court is accorded wide latitude in fashioning its charge, and when considering whether a jury has been erroneously instructed, "we view the charge as a whole, in the context of the entire case, and we ignore technical imperfections." **Pierce v. Ramsey Winch Co.,** 753 F.2d 416, 425 (5th Cir. 1985). The question posed to us is not whether the charge was faultless, "but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues." **Id.** The instructions will pass muster if they are found to be "comprehensive, balanced, fundamentally accurate, and not likely to confuse or mislead the jury." **Scheib v. Williams-McWilliams Co.,** 628 F.2d 509, 511 (5th Cir. 1980). *See also* **Bode v. Pan American World Airways, Inc.,** 786 F.2d 669 (5th Cir. 1986); **Armco Indus. Credit Corp. v. SLT Warehouse Co.,** 782 F.2d 475 (5th Cir. 1986); **Gideon v. Johns-Manville Sales Corp.,** 761 F.2d 1129 (5th Cir. 1985); **McNeese v. Reading and Bates Drilling Co.,** 749 F.2d 270 (5th Cir. 1985).

Even when we find an erroneous instruction, a reversal is not warranted if we conclude, "based upon the record, that the challenged instruction could not have affected the outcome of the case." **Pierce v. Ramsey Winch Co.,** 753 F.2d at 425 (*quoting* **Bass v. USDA,** 737 F.2d 1408, 1414 (5th Cir. 1984)).

The instruction KCS challenges could not have affected the outcome of the case. Cade and Cox did not jump from the locomotive because of a real or imagined fear of the loss of braking power on their train; they did their quick exit because they saw they were sharing the track with another behemoth. In that setting, it is manifest that the questioned charge occasions no basis for reversal.

Newly Discovered Evidence

Prior to trial, KCS sought discovery of MoPAC's "341 file," the maintenance file on the involved interlocker. At trial MoPAC tendered the wrong file. The trial judge found that MoPAC was innocent of intentional concealment. KCS now contends that the file constitutes the discovery of new evidence which mandates a new trial. We disagree. We agree with the trial judge's disposition of this issue. Having found MoPAC's action inadvertent, the trial court also found that when the error was discovered KCS failed to exercise due diligence to secure the correct file before closure of the evidence. No new trial is warranted under these circumstances. Nor is there any merit to KCS's contention that a new trial should be granted because a Federal Railroad Administration report could have been used to impeach the testimony of a MoPAC signal repairman. KCS had this report before trial. Even if it were truly newly-discovered evidence, a new trial is not in order simply because of newly discovered impeachment evidence. **Trans Mississippi Corp. v. United States,** 494 F.2d 770 (5th Circ. 1974). Likewise, there is no merit to KCS's demand for a new trial based on its contention that the evidence is overwhelmingly against the jury's finding that MoPAC was not negligent. The jury exercised its prerogative in fact-finding. We defer to those findings except in unusual circumstances. **Boeing v. Shipman,** 411 F.2d 365 (5th Cir. 1969) (*en banc*).

KCS contends that the trial court erred by excluding evidence of MoPAC's post-accident remedial modifications of the interlocker system. The trial court's ruling, consistent with Fed.R.Evid. 407[1], was correct. No MoPAC witness denied the feasibility of repairs and the evidence was not needed for impeachment.

Finally, KCS contends that the awards are so excessive as to require intervention by the court. In reviewing a jury's assessment of damages our role is sharply proscribed. We do not "grade" the jury's verdict. We accept the jury's verdict unless it is clearly and unequivocably unacceptable. As we stated in **Caldarera v. Eastern Airlines, Inc.,** 705 F.2d 778, 784, (5th Cir. 1983) (footnotes omitted):

> We do not reverse a jury verdict for excessiveness except on "the strongest of showings." The jury's award is not to be disturbed unless it is entirely disproportionate to the injury sustained. We have expressed the extent of distortion that warrants intervention by requiring such awards to be so large as to "shock the judicial conscience," "so gross or inordinately large as to be contrary to right reason," so exaggerated as to indicate "bias, passion, prejudice, corruption, or other improper motive," or as "clearly exceed[ing] that amount that *any* reasonable man could feel the claimant is entitled to.

We are especially hesitant to disturb a verdict where, as here, the trial judge has refused to adjust it. "The jury's assessment of damages is even more weighted against appellate reconsideration, especially when . . . the trial judge has approved it." **Id.** at 783-84 (footnote omitted); **Shows v. Jamison Bedding, Inc.,** 671 F.2d 927 (5th Cir. 1982).

---

[1]1. Fed.R.Evid. 407 provides:

> When, after an event, measures are taken which, if taken previously, would have made the even less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment.

Nor do we perceive any excessiveness attributable to an improper "unit of time argument" as contemplated in **Westbrook v. General Tire & Rubber Co.,** 754 F.2d 1233 (5th Cir. 1985). Counsel did not exhort the jury to evaluate the plaintiffs' projected periods of pain and suffering as a multiple of smaller time-equivalents or argue that the damages could be established by any mathematical certainty. While counsel suggested sums for mental anguish, pain, and suffering, he told the jury that the figures were merely suggestions. We find no unit-of-time taint as condemned in **Westbrook.**

On two occasions the court cautioned the jury that counsel's argument was not evidence and that they were to decide the amount of damages. Although the jury award is handsome, we cannot say that it is so excessive that it "shocks the judicial conscience." **Wood v. Diamond M Drilling Co.,** 691 F.2d 1165, 1169 (5th Cir. 1981). The trial court did not abuse its discretion in refusing to order a new trial or remittitur of the damage awards.

The judgment of the district court is AFFIRMED.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 85-2103

ALBERT WAYNE COX,

Plaintiff-Appellee,

versus

KANSAS CITY SOUTHERN RAILWAY CO.,

Defendant-Appellant.

* * * * * * * * *

MICHAEL G. CADE,

Plaintiff-Appellee,

versus

KANSAS CITY SOUTHERN RAILWAY CO.,

Defendant-Third Party Plaintiff-Appellant,

versus

MISSOURI PACIFIC RAILROAD CO.,

Third Party Defendant-Appellee.

Appeals from the United States District Court
for the Eastern District of Texas

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 20, 1986 , 5 Cir., 198__ , ___ F.2d ___)

(October 1, 1986)

Before GEE, POLITZ, and GARWOOD, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

( ) The Petition for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:

HENRY A. POLITZ
United States Circuit Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Mr. Brian R. Davis
Attorney at Law
410 First Federal Plaza
Austin, TX 78701

No. 85-2103
– Albert Wayne Cox - vs - Kansas City Railway Co.

MANDATE STAYED TO AND INCLUDING
NOVEMBER 13, 1986

This Court has this day granted a stay of the issuance of the mandate to the date as shown above. If during the period of the stay there is filed with this office a notice from the Clerk of the Supreme Court that the party who has obtained the stay has filed a petition for the writ in that court, the stay shall continue until final disposition by the Supreme Court. Upon the filing of a copy of an order of the Supreme Court denying the petition for writ of certiorari, the mandate shall issue immediately under Rule 41, FRAP.

Under revised Rule 19.1 of the Supreme Court, effective June 30, 1980, a request to certify the record prior to action by the Supreme Court on the petition for certiorari should *not* be made as a matter of course but only when the record is deemed essential to a proper understanding of the case by that court.

A copy of the opinion, judgment, or Rule 47.6 Decision, and denial of rehearing are still required by the Supreme Court to be incorporated as an appendix to your petition. Enclosed are copies of the said documents which have been entered in this cause.

Very truly yours,

GILBERT F. GANUCHEAU, Clerk

By: Della M. Jones
Deputy Clerk

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

MICHAEL G. CADE /

VS. / M-83-98-CA

KANSAS CITY /
SOUTHERN RAILWAY COMPANY

ALBERT WAYNE COX /

VS. / M-82-229-CA

KANSAS CITY
SOUTHERN RAILWAY COMPANY

VS.

MISSOURI PACIFIC /
RAILROAD COMPANY

FINAL JUDGMENT

On the 29th day of October, 1984, came on to be heard the above entitled and numbered cause and after the Court and Jury heard the pleadings, evidence, and argument of counsel, the Jury was charged by the Court and retired to consider the verdict. Thereafter, on the 31st day of October, 1984, the Jury did return into Open Court its verdict, finding in favor of the Plaintiffs and against the Defendant, Kansas City Southern Railway Company, and assessing damages as follows:

MICHAEL G. CADE – $1,716,000.00

ALBERT WAYNE COX – $850,000.00

It is, therefore, ORDERED, ADJUDGED AND DECREED that the Plaintiff, MICHAEL G. CADE, have and recover of and from the Defendant Kansas City Southern Railway Company the sum of ONE MILLION SEVEN HUNDRED EIGHT THOUSAND TWO HUNDRED SIXTY-EIGHT AND NO/100 DOLLARS ($1,708,268.00), together with interest thereon at the rate of ten and thirty three one hundreths percent (10.33%) per annum from the date hereof until the final satisfaction of this Judgment, together with all of his costs of suit.

It is further ORDERED, ADJUDGED, and DECREED that the Plaintiff, ALBERT WAYNE COX, have and recover of and from the Defendant, Kansas City Southern Railway Company, the sum of EIGHT HUNDRED FIFTY THOUSAND DOLLARS ($850,000.00), together with interest thereon at the rate of ten and thirty three one hundreths percent (10.33%) per annum from the date hereof until the final satisfaction of this Judgment, together with all of his costs of suit.

All costs in this behalf expended are taxed against the Defendant, Kansas City Southern Railway Company, for all of which execution shall issue.

It is further ORDERED, ADJUDGED, and DECREED that Defendant, Kansas City Southern take nothing against Third Party Defendant, Missouri Pacific Railroad Company, and that Third Party Defendant, Missouri Pacific Railroad Company, recover all of its costs expended from Kansas City Southern Railway Company.

SIGNED this, the 15th day of November, 1984.

/s/ Louis D. Bunton
UNITED STATES DISTRICT JUDGE

APPROVED AS TO FORM:

JONES, JONES, BALDWIN CURRY & ROTH
P.O. Drawer 1249
Marshall, Texas 75670

/s/ Franklin Jones, Jr.
By: Franklin Jones, Jr.

ATTORNEYS FOR PLAINTIFFS

MCHAFFY, WEBER, KEITH & GONSOULIN
P.O. Box 16
Beaumont, Texas 77704

By: James L. Weber

ATTORNEYS FOR KANSAS CITY SOUTHERN RAILWAY COMPANY

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

MICHAEL G. CADE

VS. M-83-98-CA

KANSAS CITY SOUTHERN RAILWAY COMPANY

CONSOLIDATED WITH
ALBERT WAYNE COX

VS. M-82-229-CA

KANSAS CITY SOUTHERN RAILWAY COMPANY

VS.

MISSOURI PACIFIC RAILROAD COMPANY

VERDICT

You are asked to answer the following questions based upon a preponderance of the evidence. Please answer "yes" or "no" unless the question specifically calls for a different response.

QUESTIONS

Question No. 1

Do you the jury find from a preponderance of the evidence that the defendant, Kansas City Southern Railroad was negligent in attempting to enter the interlocker on the occasion in question without following the procedure specified by the railroad, if they did, and that such negligence was a proximate cause of the Plaintiffs', Mr. Cox and Mr. Cade's injuries, if any? Please answer "yes" or "no".

Yes _____

If you have answered Question No. 1 above "yes", answer the following questins. If you have answered Question No. 1 "no" then you have entered a verdict for the Defendant, Kansas City Southern Railroad and there is no need to answer any further questions.

Question No. 2

Answer each question separately for each of the Plaintiffs. Answer "yes" or "no" as to whether Plaintiff was negligent in committing the following acts or omissions, and "yes" or "no" as to whether each Plaintiff was negligent in committing the following acts or omissions and "yes" or "no" as to whether such negligence, if any, proximately caused each Plaintiff's injury. Consider the Court's instructions regarding the definition of negligence and proximate cause.

Plaintiff–Michael G. Cade	Negligence	Proximate Cause
a. Jumping from the moving train at a time when a person of ordinary prudence would not have	NO	
b. Failing to keep a proper lookout	NO	
c. Traveling at an excessive rate of speed	NO	
d. Failing to make a timely and proper application of the brakes	NO	
Plaintiff–Albert Wayne Cox	**Negligence**	**Proximate Cause**
a. Jumping from the moving train at a time when an ordinary person would not have	NO	

Question No. 3

Answer "yes" or "no" as to whether the following acts or omissions, if any, of Defendant, Missouri Pacific were negligence and "yes" or "no" as to whether the acts or omissions of Defendant, Missouri Pacific proximately caused Plaintiffs' injury.

Do you find from a preponderance of the evidence that the Defendant, Missouri Pacific Railroad, independent of any acts or omissions of the Plaintiffs was negligent in committing any of the following acts or omissions:

	Negligence	Proximate Cause
a. Providing an inadequate push button in the interlock box or failing to properly maintain the same	NO	
b. Allowing trains to operate at speeds which do not give operators an adequate amount of time for stopping	NO	
c. Allowing the train to operate with defective brakes.	NO	

If you have answered "yes" to Question No. 1 above and have answered "yes" to both question of negligence and proximate cause, for any of the actions enumerated in Question No. 2 and 3, you must answer Question No. 4 and assess the percentage of negligence which proximately caused the Plaintiffs' injuries, if any. In answering you must make a comparison of fault for each Plaintiff's case and the total must equal 100%.

Question No. 4

What percentage of negligence that caused the Plaintiffs' injury, if any, do you find from a preponderance of the evidence to be attributable to each of the parties.

A. Plaintiff Michael G. Cade	0%
Defendant Kansas City Southern Railroad Company	100%
Defendant Missouri Pacific Railroad Co.	0%
Total	100%
B. Plaintiff Albert Wayne Cox	0%
Defendant Kansas City Southern Railroad Company	100%
Defendant Missouri Pacific Railroad Company	0%
Total	100%

No. 86-768

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY, ALBERT WAYNE COX, AND MICHAEL G. CADE,
Respondents.

BRIEF OF RESPONDENTS COX AND CADE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

JONES, JONES, CURRY & ROTH
FRANKLIN JONES, JR.
(Counsel of Record)
P.O. Drawer 1249
Marshall, Texas 75670
214/938-4395
Attorneys for Respondents Cox and Cade

E. L. MENDENHALL, INC., 926 Cherry Street, Kansas City, Mo. 64106, (816) 421-3030

18pp

QUESTION PRESENTED FOR REVIEW

Petitioner's first question regarding the effect of an allegedly erroneous jury instruction does not call into question the judgment for Respondents in the trial court below. Therefore, Respondents Cox and Cade reply only to the second question presented by Petitioner Kansas City Southern Railway Company in its Petition for Writ of Certiorari. A grant of the writ and a reversal on the first question alone would result only in a new trial of Petitioner's third-party action against Respondent Missouri Pacific Railroad Company. Accordingly, the Question Presented for Review in this Response is:

1. Is the affirmance by the Fifth Circuit Court of Appeals of the trial court's exercise of its discretion in allocating peremptory challenges according to 28 U.S.C. Section 1870 and in overruling an objection to a juror for cause a matter of special importance justifying review on writ of certiorari?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes:

Rules of Court:

No. 86-768

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

vs.

MISSOURI PACIFIC RAILROAD COMPANY,
ALBERT WAYNE COX, AND
MICHAEL G. CADE,
Respondents.

BRIEF OF RESPONDENTS COX AND CADE IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

STATEMENT OF THE CASE

Injured in a forced jump from their locomotive traveling on a collision course with Petitioner's train, Respondents Cox and Cade sued Petitioner, Kansas City Southern Railway Company (KCS) in a diversity action for common law negligence. Petitioner KCS brought a third party action for contribution against Respondent Missouri Pacific Railroad Company (MoPac), the employer of Cox and Cade.

A jury was chosen before Judge Robert Parker of the Eastern District of Texas based on a Pre-Trial Order in which Cox and Cade alleged negligence against the KCS; the KCS denied its own liability, alleged negligence on the part of MoPac and Cox and Cade, and disputed the extent of Respondents' injuries; and the MoPac denied liability and disputed the nature and extent of Respondents' injuries. (Rec. at 239-45).

The trial judge allocated four peremptory challenges to Cox and Cade to be exercised jointly and four to KCS and MoPac to be divided and exercised separately. After voir dire examination, Petitioner KCS objected to the allocation of peremptory challenges. However, it failed to name or describe to the court a single objectionable juror it was forced to accept on the panel. (Second Supplemental Rec. at 1-4, reproduced at Appendix A, *infra*).

Petitioner also objected for cause to juror Bray who had revealed on voir dire that he car-pooled with the mother of the wife of a possible witness. The trial judge conducted an examination of juror Bray which established that his narrow knowledge of the case would not prejudice the parties. (First Supplemental Rec. at 22-27). Accordingly, Judge Parker overruled Petitioner's challenge for cause. (First Supplemental Rec. at 32). Again, the KCS made no showing that it was forced to accept an objectionable juror because it used one of its peremptories to eliminate juror Bray, nor did it raise the argument that the jury that actually heard the case was anything but fair and competent.

In its appeal to the Fifth Circuit, Petitioner KCS complained of the peremptory strike allocation and the denial of the challenge for cause and urged that the *combination* of these two discretionary rulings by the trial judge

somehow was prejudicial to its constitutional right to a fair and impartial jury. (Brief for Appellant at 26). It argued that the trial court should have sustained its challenge for cause to juror Bray because of the court's distribution of peremptory challenges in the case. Judges Gee, Politz, and Garwood of the Fifth Circuit Court of Appeals considered the allocation issue and the challenge for cause issue separately and determined that the trial court had properly exercised its discretion in each instance. Obviously, two rights cannot make a wrong; therefore, the Fifth Circuit did not comment on the joint effect of the rulings. It affirmed the judgment of the trial court on all issues.

Petitioner filed a Petition for Rehearing in the Fifth Circuit Court concurrently with its Suggestion for En Banc Hearing. Conspicuously absent from its en banc review request was any mention of the peremptory challenge or challenge for cause issues. Petitioner's Suggestion for En Banc Hearing provides on page iii:

> Necessity for En Banc Consideration
>
> I express a belief, based on a reasoned and studied professional judgment, that this appeal involves the following questions of exceptional importance:
>
> The panel found the Trial Court's instruction on negligence was error, but substituted its finding for the finding of a jury on the issues of negligence and proximate cause, denying the KCS the right of trial by jury on those issues as guaranteed by the 7th Amendment.
>
> Respectfully submitted,
>
> /William C. Gooding/
> William C. Gooding
> ATTORNEY FOR APPELLANT
> KANSAS CITY SOUTHERN
> RAILWAY COMPANY

The KCS's Petition for Rehearing and Suggestion for En Banc Hearing were denied.

REASONS WHY THE WRIT SHOULD BE DENIED

1. THE DECISION OF THE COURT BELOW GAVE FULL CONSIDERATION TO THE JURY SELECTION ISSUES AND DECIDED THEM CORRECTLY.

A. The Allocation of Peremptory Challenges.

In reviewing a trial judge's allocation of peremptory challenges, the standard of review is whether the trial judge abused his discretion. *Fedorchick v. Massey-Ferguson, Inc.*, 577 F.2d 856 (3d Cir. 1978). In this multi-party suit, the trial court employed its statutory authority under 28 U.S.C. Section 1870[1] to allocate four peremptory challenges to Plaintiffs Cox and Cade and four to Defendant KCS and Third-Party Defendant MoPac to be divided and exercised separately. The Fifth Circuit panel considered the de facto alignment of the parties, reviewed the evidence, and dismissed as "not persuasive" the argument of the KCS that Cox and Cade and MoPac were allies in this action. (Opinion at 5). The Fifth Circuit followed established precedent, its own and that of other circuits, in determining that no abuse of discretion occurs when the trial court allots the same number of peremptory chal-

---

1. Section 1870 of Title 28, United States Code, provides:

> In civil cases, each party shall be entitled to three peremptory challenges. Several defendants or several plaintiffs may be considered as a single party for the purpose of making challenges or the court may allow additional peremptory challenges and permit them to be exercised separately or jointly.
>
> All challenges for cause or favor, whether to the array or panel or to individual jurors, shall be determined by the court.

lenges to the Plaintiffs as to the Defendant and Third-Party Defendant jointly.[2]

The Court further found that the Petitioner failed to demonstrate any prejudice in the allocation because there was no showing that the additional peremptory challenges it requested would have been used. Only in its Petition for Rehearing in the Fifth Circuit, and now in its Application for Writ of Certiorari, has the Petitioner described two jurors it apparently would have struck. It failed to name or identify these jurors to the trial judge or to allude to their unsuitability, a prerequisite to establishing prejudice and harm in the allocation of peremptory strikes. *Goldstein v. Kelleher*, 728 F.2d 32, 38 (1st Cir.), *cert. denied*, 105 S.Ct. 172 (1984); *Matanuska Valley Lines v. Neal*, 255 F.2d 632, 636 (9th Cir. 1951); *Standard Industries, Inc. v. Mobil Oil Corp.*, 475 F.2d 220, 225 (10th Cir. 1973).

B. The Challenge for Cause.

A district court has wide discretion in ruling on challenges for cause and will be reversed only if there is a manifest abuse of discretion. *Dennis v. United States*, 339 U.S. 162, 168 (1949). The trial judge in this case refused the challenge for cause by KCS to juror Bray based on his having heard about the accident in question from a potential witness' mother-in-law. (First Supplemental Rec. at 32). Citing *Irvin v. Dowd*, 363 U.S. 717 (1961), the Fifth Circuit panel noted that a dismissal for cause is in order only when exposure to information about an accident has resulted in a fixed opinion about the merits of the case. The Court examined the record and determined that the

---

2. The Court cited *Carey v. Lykes Brothers Steamship Co.*, 455 F.2d 1192 (5th Cir. 1972); *Goldstein v. Kelleher*, 728 F.2d 32 (1st Cir.), *cert. denied*, 105 S.Ct. 172 (1984); *Fedorchick v. Massey-Ferguson, Inc.*, 577 F.2d 856 (3d Cir. 1978).

venireman had satisfied the trial court that his knowledge of the facts would not affect his service as a juror.

The Fifth Circuit further found no evidence in the record that the Petitioner was forced to accept an otherwise objectionable juror because it had used a peremptory strike on juror Bray. The KCS raised no argument in the trial court that the jury which actually heard the case was anything but fair and impartial. (Second Supplemental Rec. at 1-4). Having described and named jurors it found unacceptable *for the first time* in its Petition for Rehearing in the Fifth Circuit Court of Appeals, the KCS wholly failed to demonstrate harm; and the Fifth Circuit correctly found no merit in the trial court's denial of the challenge for cause.

C. The Tandem Effect of the Jury Selection Issues.

Petitioner KCS urges that the "tandem" effect of the trial court's apportionment of strikes coupled with its denial of Petitioner's challenge for cause denied it a fairly constituted jury. The KCS asserts that "the denial of petitioner's challenge-for-cause, though it might be affirmed in a vacuum, had the actual effect of substantially impairing petitioner's right of peremptory challenges." (Petition for Writ of Certiorari at 13). Petitioner appears to urge that when a trial court overrules a party's challenge for cause, it must grant an additional peremptory strike to that party to assure a fair trial. This argument makes no legal sense, is unsupported by any authority, and would create chaos in the courts.

The Fifth Circuit Court determined that the trial court properly employed its discretion to allocate peremptory strikes as specifically authorized in 28 U.S.C. Section 1870.

It found the trial court properly exercised its discretion to deny Petitioner's challenge for cause to juror Bray. It found in each instance that the Petitioner failed to demonstrate harm by indicating that any member of the jury selected was unsatisfactory to it at the time the jury was empaneled. The cumulative effect of two correct rulings by the trial judge cannot amount to error as urged by Petitioner.

2. THE JURY SELECTION QUESTION EMBODIED IN THE PETITION FOR WRIT OF CERTIORARI IS NOT SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S REVIEW.

The frivolity of the jury selection issue is demonstrated by Petitioner's failure to include this issue in its Suggestion for En Banc Hearing in the Fifth Circuit Court of Appeals. Were the issue one of exceptional importance to the public or one involving a real or apparent conflict among the circuit courts of appeal, surely it would have appeared in the requested en banc review. It did not.

In this Court, Petitioner does not suggest that the Fifth Circuit's opinion poses a conflict with a decision of this Court or that of another federal court of appeals. Rather, it seeks this Court's review of the joint effect of two discretionary rulings by a trial court judge, acts which have individually withstood the scrutiny of the appellate court below. Whether juror Bray should or should not have been struck for cause in this case and whether the allocation of peremptory challenges was unfair in light of his inclusion in the panel, an argument wholly lacking in legal logic, are questions of concern only in the context of the facts of this case and to its parties. Their review is not the type contemplated under Rule 17.1 of the Supreme Court

Rules[3] nor opinions of this Court. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) ("[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeal."); *Ex parte Lau Ow Bew*, 141 U.S. 583 (1891) (Review by certiorari should be sparingly exercised, used only in cases of peculiar gravity and general importance, or in cases affecting relations with foreign governments, or to secure uniformity of decisions.).

CONCLUSION

Petitioner's Question Number 2 presented in its Petition for Writ of Certiorari urges this Court to review jury selection issues committed to the discretion of the trial

---

3. Rule 17.1 of the Supreme Court Rules provides:

Rule 17. Considerations governing review on certiorari

1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

judge, affirmed by the Fifth Circuit, and deemed so insignificant by Petitioner as to be omitted from its Suggestion for En Banc Hearing. There is no conflict between the jury selection rulings below and any pronouncement of this Court or that of any circuit court of appeals. None of the criteria of Rule 17.1 are met in this Petition. Petitioner obviously seeks a new trial so that it can reform a faulty trial strategy that failed at the trial of this case two years ago. Respondents Cox and Cade respectfully pray that Writ of Certiorari be denied.

Respectfully submitted,

JONES, JONES, CURRY & ROTH
P.O. Drawer 1249
Marshall, Texas 75670
214/938-4395

By FRANKLIN JONES, JR.
Attorneys for Respondents Cox and Cade

CERTIFICATE OF SERVICE

I hereby certify that th.ee (3) copies of the foregoing Brief of Respondents Cox and Cade in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been mailed by United States mail, first-class postage prepaid, addressed to the attorneys for Petitioner, Mr. Daniel V. Flatten, Mr. James L. Webber, and Mr. Bryan R. Davis, Mehaffey, Webber, Keith & Gonsoulin, Interfirst Tower, P.O. Box 16, Beaumont, Texas 77704 and Mr. William C. Gooding, Wheeler, Gooding & Dodson, P.O. Box 1838, Texarkana, Texas 75504, and to the attorneys for Respondent Missouri Pacific Railroad Company, Mr. Mike A. Hatchell, P.O. Box 629, Tyler, Texas 75701, on this the 8th day of December, 1986 at the time of filing with the Clerk. All parties required to be served have been served.

FRANKLIN JONES, JR.
Counsel for Petitioner

APPENDIX A

SECOND SUPPLEMENTAL RECORD ON APPEAL

THE COURT: I assume there is an objection to the jury as constituted, is that correct?

MR. WEBER: There is, after having seen the strike list, Your Honor.

THE COURT: When we come back at 1:30, we will correct it.

Is there any objections to the Court correcting it?

MR. FLOCK: Not from me.

THE COURT: The plaintiffs?

MR. JONES: No, sir.

REPORTER'S NOTE: Whereupon the noon recess was taken by the Jurors and the following proceedings were heard after the Jurors left the courtroom.

THE COURT: Be seated.

Now, you wish to place a matter on the record, gentlemen?

MR. WEBER: Comes now the Kansas City Southern Railway and, prior to selection of the Jury, would lodge its objection to the Court's allowance of strikes and would show that the Court –

THE COURT: First of all, Mr. Weber, let me make sure the record reflects what the Court has done. The Court in conference in chambers with counsel, was advised that there was legitimate controversy between the two railroads, defendant and third party defendant. The Court permitted additional strikes in that the Court gave plaintiffs four (4) strikes, each defendant two (2) strikes each

and each defendant one (1) strike for the alternate and, the plaintiffs one (1) strike for the alternate.

MR. WEBER: That is our understanding, Your Honor. Having done that, the Kansas City Southern feels, Your Honor, that based on comments made by Mr. Flock that the Missouri Pacific is adverse to the plaintiffs only insofar as the extent and duration of damages is concerned. That the allegations of strikes is unfavorable for this reason. The Kansas City Southern trying a case against two opponents essentially, the Missouri Pacific and the Plaintiffs, the Missouri Pacific, on the other hand, is really trying a case, other than on damages, which the evidence will show how much it is contested other than damages, trying a case only against Kansas City Southern. The plaintiffs is trying a case, really, only against the Kansas City Southern and what we end up with is plaintiffs with four (4) strikes, the Missouri Pacific with whom the plaintiff's interests are very closely aligned and total alignment on liability with another two (2) strikes for the MOP and the KCS with only two (20 strikes. At least on liability we are sitting in a situation where the KCS has two (2) strikes and they have six (6). I realize they did not strike together.

Nevertheless when one looks at his jury list, that is the way he looks at it, and, Your Honor, I just feel like that it would have been fairer to give – do it some other way, perhaps give each defendant two (2) or to, I don't think MOP wanted to strike with KCS anyway, but I would think the fairest way would have been give each party – I mean, each defendant two (2) strikes and let it go at that.

THE COURT: Counsel, you have preserved your point.

MR. WEBER: I might add, Your Honor, that on the damage aspect of the case, each defendant had two (2)

strikes and, of course, not collaborate and the plaintiffs had again four (4) strikes on damages.

THE COURT: The objection is overruled.

MR. WEBER: Thank you.

THE COURT: Gentlemen, it will be necessary for you to return at 1:30 since we need to correct the clerical error on the jury.

We are in recess.

No. 86-768 (3)

In The
Supreme Court of the United States
October Term, 1986

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,
Petitioner,

VS.

MISSOURI PACIFIC RAILROAD COMPANY, ALBERT WAYNE COX, AND MICHAEL G. CADE,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY MISSOURI PACIFIC RAILROAD COMPANY

MICHAEL A. HATCHELL
P. O. Box 629
Tyler, Texas 75710
Phone (214) 597-3301
Attorney For Missouri Pacific Railroad Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

10 pp

NO. 86-768

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

———o———

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioner,

VS.

MISSOURI PACIFIC RAILROAD COMPANY, ALBERT WAYNE COX, AND MICHAEL G. CADE,

Respondents.

———o———

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

———o———

CERTIFICATE

———o———

The following are the parties to the suit requested to be listed under Rule 28.1.

1. Mr. Albert Wayne Cox.
2. Mr. Michael G. Cade.
3. Missouri Pacific Railroad Company.
4. Union Pacific Railroad Company.

5. Kansas City Southern Industries, Inc. (parent).

6. The Kansas City Northern Railway Company.

7. The Kansas City Southern Railway Company.

8. Louisiana & Arkansas Railway Company.

9. The American-Coleman Company.

10. American-Coleman International Corp.

11. The Arkansas Western Railway Company.

12. Boston Financial Data Services, Inc.

13. Carland, Inc.

14. Cybertech, Inc.

15. DST, Inc.

16. DST Clearing, Inc.

17. DST-Computer-Services, S.A.

18. DST Securities, Inc.

19. Fort Smith and Van Buren Railway Company.

20. Investors Fiduciary Trust Company.

21. Joplin Union Depot Company.

22. The Kansas and Missouri Railway and Terminal Company.

23. Kansas City Southern Transport Company, Inc.

24. Kansas City Terminal Railway Company.

25. Landa Motor Lines.

26. Lonestar-KC Concrete Tie Company.

27. Louisiana, Arkansas & Texas Transportation Company.

28. The Maywood and Sugar Creek Railway Company.

29. Midwestern Minerals, Inc.

30. Mid-America Television Company.

31. Northern Properties Corporation.

32. Pabtex, Inc.

33. Pioneer Western Corporation.

34. Pioneer Western Energy Corporation.

35. Pioneer Western Financial Corporation.

36. Pioneer Western Financial Planning Corporation.

37. Pioneer Western Management, Inc.

38. Pioneer Western Marketing Corporation.

39. Reserve Realty.

40. Rice-Carden Corporation.

41. Rycom Instruments, Inc.

42. Southern Development Company.

43. Supporet Systems, Inc.

44. Tolmak, Inc.

45. Trans Serve, Inc.

46. Veals, Inc.

47. Wall Street Clearing Company.

48. Western Reserve Financial Services Corp.

49. Western Reserve Life Assurance Co. of Ohio.

50. The Western Pacific Railroad Company

Union Pacific Corporation
Pacific Rail System, Inc.
Missouri Pacific Corporation
UP Sub, Inc.
Pacific Subsidiary, Inc.
Champlin Alaska Pipeline, Inc.
Champlin Gas Gathering, Inc.
Champlin Marketing, Inc.
Champlin Refining, Inc.
American Refrigerator Transit Company
Chicago Heights Terminal Transfer Railroad Company
Doniphan, Kensett & Searcy Railroad
Missouri Improvement Company
MP Redevelopment Corporation
Park Spring, Inc.
Stonegate Park, Inc.
Jefferson Southwestern Railroad Company
Southern Illinois and Missouri Bridge Company
The Alton & Southern Railway Company
MP Equipment Corporation
Missouri Pacific Truck Lines, Inc.
Brownsville & Matamoros Bridge Company
Missouri Pacific Air Freight, Inc.
Missouri Pacific Intermodal Transport, Inc.
Texas & Missouri Pacific Railroad Company
The Weatherford Mineral Wells and Northwestern Railway Company
Galveston, Houston and Henderson Railway Company
Houston Belt & Terminal Railway Company
Terminal Railroad Association of St. Louis
Trailer Train Company
Arkansas & Memphis Railway Bridge and Terminal Company
Kansas City Terminal Railway Company
The Belt Railway of Chicago
Penn Central Corporation
The Pueblco Union Depot and Railroad Company
Chicago & Western Indiana Railroad Company

Texas City Terminal Railway Company
Terminal Industrial Land Company
Great Southwest Railroad, Inc.
Wasatch Insurance Limited
UP Leasing Corporation
Union Pacific Finance N.V.
Union Pacific Foundation
Champlin Petroleum Company
Calnev Pipe Line Company
Champlin Gas Processing Company
Champlin Liquid Pipeline, Inc.
MKT Exploration Company
Champlin International Petroleum Company
Wamsutter Pipeline, Inc.
Champlin Petrochemicals, Inc.
CMT Ltd.
Champlin Pipeline, Inc.
Nueces Pipeline, Inc.
Harbor Service Stations, Inc.
Union Pacific Resources Corporation
Upland Industries Corporation
Unita Development Company
Union Pacific Land Resources Corporation
Upland Industrial Development Company
Quality Aggregate Company
Rocky Mountain Energy Company
Bitter Creek Coal Company
Elk Mountain Coal Company
Hanna Basin Coal Company
Kanda Development Company
Prospect Point Coal Company
Rock Springs Royalty Company
Champlin Trading Company
Champlin Midcontinent Crude Oil Pipeline, Inc.
Champlin Midcontinent Marketing, Inc.
Champlin Midcontinent Products Pipeline
Champlin Arguello Pipeline, Inc.
Panola Pipe Line, Inc.
Esperanza Pipeline Company
Champlin Canada, Ltd.
Union Pacific Resources, Ltd.

Overthrust Pipe Line, Inc.
Champlin Gas Pipeline, Inc.
R M Leasing Company
Winton Coal Company
Stauffer Chemical Company of Wyoming
Oregon Short Line Railroad Company
Camas Prairie Railroad Company
Los Angeles & Salt Lake Railroad Company
Des Chutes Railroad Company
Yakima Valley Transportation Company
Oregon-Washington Railroad & Navigation Company
Mount Hood Railway Company
Union Pacific Fruit Express Company
Union Pacific Motor Freight Company
Union Pacific Freight Services Company
Spokane International Railroad Company
The St. Joseph & Grand Island Railway Company
St. Joseph Terminal Railroad Company
The Ogden Union Railway & Depot Company
Portland Traction Company
Oakland Terminal Railway
Alameda Belt Line
Tidewater Southern Railway Company
Standard Realty and Development Company
WPX Freight System, Inc.
Delta Finance Company, Ltd.
Sacramento Northern Railway
Denver Union Terminal Railway
Portland Terminal Railroad Company
Longview Switching Company
Central California Traction Company

SUBJECT INDEX

LIST OF AUTHORITIES

Case Authority:

LIST OF AUTHORITIES—Continued

No. 86-768

In The

Supreme Court of the United States

October Term, 1986

THE KANSAS CITY SOUTHERN RAILWAY COMPANY,

Petitioner,

VS.

MISSOURI PACIFIC RAILROAD COMPANY, ALBERT WAYNE COX, AND MICHAEL G. CADE,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY MISSOURI PACIFIC RAILROAD COMPANY

To the Honorable Supreme Court of the United States:

Your petitioner, Missouri Pacific Railroad Company, responds to the issues in Kansas City Southern's petition for writ of certiorari as follows:

REASONS FOR DENYING THE WRIT

KCS's petition for certiorari asks this court to review two ordinary procedural matters in this diversity case: (i) the district court's allocation of jury strikes and (ii) a charge concerning the necessity of operative air brakes on Missouri Pacific's train. We respond to those narrow, technical issues in the order presented:

1.

The jury's allocation of jury strikes was proper, but not harmful in any event.

The district court's allocation of jury strikes was a proper exercise of statutory discretion; nevertheless, no harm resulted therefrom.

a. The allocation as proper: The district court's decision to treat plaintiffs and defendants as "sides" and increase the number of strikes per "side" to four (First Suppl. Record, Stapled Addendum, pp. 2-3) is "**** expressly authorized by Section 1870, Title 28, *United States Code* ****". *Carey* v. *Lykes Brothers Steamship Co., Inc.*, 455 F.2d 1192, 1194 (5th Cir. 1972).

The district court's decision to employ its statutory authority was appropriate in light of the pleadings and adversity of the parties. At jury selection, the court was presented with two plaintiffs (represented by one attorney), one defendant (Kansas City Southern), and one third-party defendant (Missouri Pacific). Both plaintiffs were adverse to both defendants (i.e., to KCS on all issues and to Missouri Pacific on damages). Sides were thus

formed by the pleadings and the issues, thus positing the court's allocation of strikes well within the discretion permitted by § 1870. *Moore* v. *South African Marine Corporation, Ltd.*, 469 F.2d 280, 281 (5th Cir. 1972); *Fedorchick* v. *Massey-Ferguson, Inc.*, 577 F.2d 856, 858 (3rd Cir. 1978).

The allocation adopted by the court was not inimical to KCS's right to a fair and impartial jury so as to be an abuse of discretion. Both sides to the controversy had an equal number of strikes. Each party, considered separately, had an equal number of strikes as to each adverse party. The rule that has evolved out of comparable suits with similar party alignments is that:

> "*** the trial judge may require a defendant-third-party plaintiff and third-party defendants to share the same number of peremptory challenges as allocated to a single plaintiff. ***"

Fedorchick v. *Massey-Ferguson, Inc.*, supra, 577 F.2d 858; *Moore* v. *South African Marine Corporation, Ltd.*, supra, 469 F.2d 280, 281 (5th Cir. 1972); *Nehring v. Empresa Lineas Maritimas Argentinas*, 401 F.2d 767, 768 (5th Cir. 1968). In fact, the trial court allocated more strikes to KCS than the minimum allowed by the foregoing rule.

b. The allocation as harmless: No harm is shown from the district court's allocation of peremptory challenges, in any event.

Erroneous methods of allocating peremptory challenge are subject to the harmless error rule. Rule 61, *Fed. R. Civ. Proc.* KCS made no effort to demonstrate that "*** if a further peremptory challenge had been al-

lowed, ... [it] meant to challenge one or more jurors***". *Goldstein v. Kelleher,* 728 F.2d 32, 38 (1st Cir. 1983). In failing to meet that minimum requirement, KCS failed to establish harm from the denial of additional peremptory challenges. *Goldstein* v. *Kelleher,* supra; *Rogers* v. *De-Vries & Co.,* 236 F. Supp. 110 (D.C. Tex. 1964). KCS's complaint to the denial of a challenge for cause is subject to the doctrine of *de minimis non curat lex.* We defer to the discussion at pp. 5-6 of Cox's and Cade's brief in opposition.

2.

The charge on air brakes was harmless, if erroneous, and would not have resulted in a negligence per se submission under Texas law, in any event.

Although adorned with lofty constitutional trappings, the complaint to the charge, as disposed of by the court of appeals, involves nothing more than a question of fact in a cause of action governed by state law. This is not a substantial federal question, within the meaning of Rule 17, *Rules of the Supreme Court of the United States.* See *Rice* v. *Sioux City Cemetery,* 75 S.Ct. 614, 349 U.S. 70, 99 L.Ed. 897 (1955).

In context, the charge on air brakes was academic. More substantively, under Texas law, KCS could not have obtained a negligence *per se* submission from violation of the subject regulation, to wit:

a. The instruction as academic: First of all, as a matter of law, six non-operational power brakes on Missouri Pacific's train could not have caused the injuries in suit. Cox and Cade jumped from the train 400 ft. from the ultimate point of collision. (I Tr. 81.) The only effect six less power-braked cars had on the

operation of Missouri Pacific's train was to lengthen the emergency stop by 56 ft. (II Tr. 39-40.) However, Cox and Cade jumped from the train 400 ft. from the ultimate point of collision. (I Tr. 81.)

The jury determined that Cox's and Cade's decision to jump from the train at the time they did was reasonable. (R. 205.) There is no evidence that, at the time of their jump, Cox or Cade knew that their train had inoperable power brakes on six cars, if it did; there is no evidence that they jumped from fear of danger caused by inoperative power brakes. The court of appeals was correct in holding, under Texas law, that the unreasonable risk that caused Cox's and Cade's injuries was KCS blocking the crossing by reason of its negligent failure to follow its instructions for safely proceeding through a crossing. Alleged defects in MoPac's power brakes could not, as a matter of law, have had any causal effect upon the plaintiffs' emergency exit from the train (which caused their injuries) or upon KCS's negligent conduct in blocking the crossing. The giving of the questioned charge on air brakes, erroneous or not, was academic; in context, it could not affect the outcome. Compare: *East Texas Theatres, Inc.* v. *Rutledge,* 453 S.W.2d 466 (Tex. 1970); *Wohlford* v. *Texas & N. O. R. Co.,* 128 S.W.2d 449 (Tex. Civ. App., 1939, writ dism., judgm. cor.).

b. Inapplicability of negligence per se: The district court submitted operation of the train with inoperative brakes as a ground of ordinary negligence. (II Tr. 23.) The only harm claimed by KCS from the purportedly erroneous instruction is the denial of a negligence *per se* submission under Texas law. However, Texas

law would not recognize a regulation, such as 45 *C.F.R.*, § 232.1, as a proper basis for negligence *per se*.

Texas courts determine in each instance whether a penalty provision in a statute codifies a legitimate standard of care so that occurrence of the prohibited conduct can be said to be a breach of the standard *per se*. *Carter* v. *Wm. Sommerville & Son, Inc.*, 584 S.W.2d 274 (Tex. 1979). Texas courts thus do not permit a statutory pronouncement to stand as negligence *per se* "*** when the actor is unable after reasonable care or diligence to comply with the regulation ***". *Lawrence* v. *Hardy*, 583 S.W.2d 795, 800 (Tex. Civ. App., 1979, writ ref., n.r.e.).

KCS's interpretation of 45 *C.F.R.*, § 232.1, imposes an absolute duty where a power brake, in perfect operating order upon initial inspection, malfunctions while the train is in operation, without knowledge of the railroad, without circumstances indicating it should have known of the defect, and without the ability to correct it. In other words, KCS's application of the regulation would impose a form of guarantee or suretyship as to the nature of the railroad's equipment, divorced entirely from prudent conduct or the exercise of reasonable care.

Faced with that interpretation, Texas courts would reject the argument that 45 *C.F.R.*, § 232.1, codifies a type of conduct that represents an attainable standard of care. Instead, Texas courts would hold that, as interpreted by KCS, 45 *C.F.R.*, § 232.1, is "*** so far removed ***" from conduct that it does not provide an appropriate basis for negligence *per se* under Texas law, *Carter* v. *Wm. Sommerville & Son, Inc.*, supra, or that the regulation has such a unique administrative or regulatory purpose that it is

not "*** a standard by which civil liability is to be judged ***". *Continental Oil Co.* v. *Simpson*, 604 S.W.2d 530, 536 (Tex. Civ. App., 1980, writ ref., n.r.e.).

Since KCS obtained a submission asking whether operation of the train with inoperative brakes was ordinary negligence, it obtained all it could under Texas law.

WHEREFORE, PREMISES CONSIDERED, Missouri Pacific prays that the petition for certiorari be denied. It additionally prays for such other and further relief to which it may justly be entitled at law or in equity.

Respectfully submitted,

MICHAEL A. HATCHELL
Bar No. 09219000

P. O. Box 629
Tyler, Texas 75710
214-597-3301

Attorney for Missouri Pacific Railroad Company